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THE CONSIDERATION OF A CONTRACT.

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§ 42.—*Moral Obligation.*—It is stated in the books that a moral obligation is a sufficient consideration for an *express* promise.[1] This rule was first enunciated by Lord Mansfield,[2] and seems not to have been called in question till the searching note of Bosanquet and Puller to the case of *Wennall* vs. *Abney*.[3] It is found in the reports of several American States.[4] This rule, broadly affirmed that

[1] Watson *vs.* Turner, Bull. N. P. 147; Atkins *vs.* Banwell, 2 East, 505; Cooper *vs.* Martin, 4 Id. 76; Barnes *vs.* Hedley, 2 Taunt. 184; Lee *vs.* Muggeridge, 5 Id. 36; Scott *vs.* Nelson, Esp. Dig. 95; Seago *vs.* Deane, 4 Bing. 459. "I hope that the judges in Westminster Hall will always hold that a moral obligation to pay is a sufficient consideration for a promise to pay." Per Best, C. J.: Wells *vs.* Horton, 2 C. & P. 383.

[2] Atkins *vs.* Hill, Cowp. 284; Hawkes *vs.* Saunders, Id. 290; Trueman *vs.* Fenton, Id. 544.

[3] 3 B. & P. 249.

[4] Salem *vs.* Andover, 3 Mass. 438; Andover *vs.* Gould, 6 Id. 43; Davenport *vs.* Moore, 15 Id. 94; Gleason *vs.* Dyke, 22 Pick. 390; 1 Swift Dig. (Conn.) 2045; 7 Johns. 83; Smith *vs.* Ware, 13 Id. 382; Doty *vs.* Wilson, 14 Id. 381.; Bentley *vs.*

wherever there is a moral obligation, which no court of law or equity can enforce, the ties of conscience upon an upright man, and the honesty and rectitude of the thing are a sufficient consideration for an express promise to fulfill it,[1] has been subjected to legal criticism and abandoned by the courts wherever it has lately come under consideration, both in England[2] and in this country.[3] It did not appear before the time of Lord Mansfield, it was not required to sustain the cases decided by him, as they might have been settled on narrower legal principles, and an ample consideration existed, which was rendered inoperative for the time, by some exceptional rule of law. If it were true that a moral obligation were competent to convert an express promise into a legal contract, every promise must be enforced and the whole doctrine of a consideration discarded, inasmuch as a promise fairly and deliberately made is binding on the conscience. But to enforce the rules, which an elevated morality enjoins, does not come within the limited sovereignty of municipal law.[4]

Morse, Id. 468; Stewart *vs.* Eden, 2 Caines, 152; Barlow *vs.* Smith, 4 Vt. 144; Glass *vs.* Beach, 5 Id. 175; Pennington *vs.* Gittings, 2 G. & J. 217; Greeves *vs.* McAllister, 2 Binney, 591; Ernest *vs.* Parke, 4 Rawle, 452; 5 Ohio, 56, 1 Rice, S. C. Dig. 60.

[1] Atkins *vs.* Hill, Cowp. 284; Hawkes *vs.* Saunders, Id. 290.

[2] In Littlefield *vs.* Shee, 2 B. & Ad. 811, Lord Tenterden said: "It must be received with some limitation." In Jennings *vs.* Brown, 9 M. & W. 501, Parke Baron said: "A mere moral obligation *which is nothing.*" In Kaye *vs.* Dutton, 7 M. & G. 807, Tindall, C. J. said: "A subsequent express promise will not convert into a debt that which of itself is not a legal debt." The whole doctrine was overruled in an exhaustive judgment in the Queen's Bench, by Lord Denman, C. J. Eastwood *vs.* Kenyon, 11 A. & E. 438, S. C. 2 P. & D. 276. Said Lord Denman in Beaumont *vs.* Reeve, 8 Q. B. 483: "The result is that an express promise cannot be supported by a consideration from which the law would not imply a promise, except when the express promise does away with a legal suspension or bar of a right of action, which but for such suspension or bar would be valid."

[3] Mills *vs.* Wyman, 3 Pick. 307: Loomis *vs.* Newhall, 15 Id. 159; Dodge *vs.* Adams, 19 Id. 429; Valentine *vs.* Foster, 1 Met. 520; Farnham *vs.* O'Brien, 22 Maine, 475; Warren *vs.* Whitney, 24, Id. 561; Cook *vs.* Bradley, 7 Conn. 57; Edwards *vs.* Davis, 16 Johns. 281; Ehle *vs.* Judson, 24 Wend. 97; Geer *vs.* Archer, 2 Barb. 420; Nash *vs.* Russell, 5 Id. 566; Hatchell *vs.* Odom, 2 Dev. & Bat. 302.

[4] See § 3.

§ 43.—It is, nevertheless true, that many of the cases in which a moral obligation was said to be a valid consideration for an express promise were correctly decided. The promise of a debtor to pay a debt to which the remedy is barred by the statute of limitations or by bankruptcy;[1] of an adult to pay a debt contracted in infancy not for necessaries;[2] of the drawer of a bill of exchange, or the indorser of a bill or promissory note to pay the amount, notwithstanding want of legal notice of non-acceptance or dishonor;[3] of the borrower of money hired on a usurious contract to pay principal and lawful interest;[4] of a lessor to pay for repairs made by his lessee according to parol agreement,[5] will be enforced without any new consideration. It has been once held in England,[6] and to the same effect there are *dicta* in this country,[7] that the promise of a widow to pay for money expended at her request in coverture is binding. But according to the strong bent of late authorities in England,[8] and according to a recent direct decision in New York,

[1] Lonsdale *vs.* Brown, 3 Wash. C. C. 90; S. C. 4 Id. 149. A mere expression of an intention to pay is not sufficient. Yoxtheimer *vs.* Keyser, 11 Penn. State, 364. Or an acknowledgment to a third person not an agent of the creditor 17 Id. 286. If the promise is conditional, the condition must be fulfilled. Brown *vs.* Collier, 8 Humph. 510, 32 Maine, 163; Lafarge *vs.* Jayne, 9 Barr, 510; Tompkins *vs.* Brown, 1 Denio, 247. Mere statement of a debt in a schedule of bankruptcy is not sufficient. Christy *vs.* Flemington, 10 Barr, 129. A note revived by a new promise does not recover its negotiability. Walbridge *vs.* Harrow, 18 Vt. 448. See Turner *vs.* Chrisman, 20 Ohio, 332; Otis *vs.* Gazlin, 31 Maine, 567, 32 Id. 163, 181.

[2] 1 Str. 690: 2 Kent Comm. 234–239.

[3] Hopes *vs.* Alden, 6 East, 16 (n); 2 T. R. 713; Story Bills, § 320; Story Notes, § 362. *Contra* as to promise of a guarantor to pay a debt discharged by the laches of the creditor. Van Derveer *vs.* Wright, 6 Barb. 547.

[4] Barnes *vs.* Hedley, 2 Taunt. 184; Kilbourne *vs.* Bradley, 3 Day, 256, 19 Johns. 147; Jacks *vs.* Nichols, 5 Barb. 38. But see 1 Campb. 157.

[5] Seago *vs.* Deane, 4 Bing. 459; Farnham *vs.* O'Brien, 22 Maine, 475. The promise of a creditor to refund money recovered in a suit after a receipt was found, which if known at the time of the suit would have prevented recovery, has been held binding. Bently *vs.* Morse, 14 Johns. 148.

[6] Lee *vs.* Muggeridge, 5 Taunt. 147.

[7] Cook *vs.* Bradley, 7 Conn. 57; Hatchell *vs.* Adams, 2 Dev. & Bat. 302; Ehle *vs.* Judson, 24 Wend. 97; Geer *vs.* Archer, 2 Barb. 420.

[8] Littlefield *vs.* Shee, 2 B. & Ad. 811; Meyer *vs.* Howorth, 8 A. & E. 467; Eastwood *vs.* Kenyon, 11 Id. 438. See Lloyd *vs.* Lee, 1 Str. 94.

the contracts of a feme covert are absolutely void, and cannot acquire validity by an express promise to fulfill them after the disability of coverture is removed.[1] If the exemption of the party sought to be charged has been created by *the act of the parties*, as by a release and not by the operation of law, the liability of the debtor will not be restored by his subsequent promise, whether the release was designed for his benefit or for that of the creditor.[2] Nor will a subsequent promise revive a contract which is void because of fraud on third parties,[3] or oblige a hirer to pay for services, the compensation of which has been forfeited according to agreement between the parties by the intoxication of the employee.[4]

§ 44.—The cases in which a promise is allowed to give validity to an agreement not otherwise enforceable at law, have been put on the ground that a moral obligation is a sufficient consideration where there has been a pre-existing legal obligation.[5] This rule does not include the contracts of infants, on whom no such legal obligation rests.[6] Most of them stand on their own footing, and are not subject to the strict operation of any one rule. Perhaps they may be included within the rule, to which exceptions may yet be found to exist, that wherever there is a contract founded on a sufficient consideration, which would have been enforced but for some positive exceptional rule of law designed for the protection of the party to

[1] Watkins *vs.* Halstead, 2 Sandford, 311; Story Notes, § 185. But it seems that if goods were furnished her during coverture *on faith of her separate estate*, her promise after coverture would be binding. Vance *vs.* Wells, 8 Ala. 399; Kennerly *vs.* Martin, 8 Miss. 698.

[2] As a release to qualify a witness, Valentine *vs.* Foster, 1 Met. 520; or a discharge by accord and satisfaction, Stafford *vs.* Bacon, 1 Hill N. Y. 532; S. C. 25 Wend. 384; or a release by creditors on the assignment of the debtor's effects to trustees, Warren *vs.* Whitney, 24 Maine, 561. But *contra*, Willing *vs.* Peters, 12 S. & R. 177, shaken by Snevily *vs.* Reed, 9 Watts, 396. In Trumbull *vs.* Tilton, 1 Foster N. H. 128, it is doubted whether there should be this distinction between a discharge by operation of law and discharge by the will of the parties.

[3] Cockshott *vs.* Bennett, 2 T. R. 763; Trumbull *vs.* Tilton, 1 Foster N. H. 128.

[4] Monkman *vs.* Shephardson, 11 A. & E. 411.

[5] Wennall *vs.* Abney, 3 B. & P. 249 note; Mills *vs.* Wyman, 3 Pick. 307.

[6] Farnham *vs.* O'Brien, 22 Maine, 475; Valentine *vs.* Foster, 1 Met. 521; Geer *vs.* Archer, 2 Barb. 425.

be charged and unconnected with the element of consideration, that protection may be waived by an express promise, in some cases at his pleasure, and in others after the period of disability has passed.[1]

§ 45.—*Executed considerations.*—A consideration is said to be *executory* when it is to be executed in the future according to the terms of the contract.[2] It is said to be *executed*, when it consists of something already done, and, as a general rule, an executed consideration will not support a promise unless it was performed with the previous request of the promisor.[3] Thus, a promise on consideration that differences *had been* submitted to arbitration;[4] that land had been conveyed;[5] that notes had been endorsed;[6] that board had been furnished;[7] that services had been rendered to secure the promisor's election to an office,[8] is not binding. This doctrine is well established, notwithstanding Mr. Justice Wilmot[9] said of the old cases which illustrate it, "that they are strange and absurd," and that "it has been melting down into common sense of late times." It is, however, chiefly of importance as a rule of pleading. Such a promise must be declared on as is binding, and if laid upon a past consideration, for all that appears upon the record, it may have been a voluntary courtesy.[10] The allegation of a request may be sustained by evidence, which proves that the benefit could not have been understood between the parties to have been conferred gratuitously; but if so undertood, we presume it would not sustain the subsequent promise of the party who enjoyed it, even

[1] The rule is well stated in Selwyn N. P. 55, 11th ed.

[2] A promise to do an act in consideration of some act promised to be done implies a request. Union Bank *vs.* Coster, 3 Comst. 211.

[3] Hunt *vs.* Bate, Dyer, 272 (b); Hayes *vs.* Warren, 2 Str. 933; Oliverson *vs.* Wood, 3 Lev. 366; Sydenham *vs.* Worlington, 1 Godb. 33; Barber *vs.* Halifax, Cro. Eliz. 741.

[4] Barlow *vs.* Smith, 4 Vt. 139.

[5] Comstock *vs.* Smith, 7 Johns. 87.

[6] Buckley *vs.* Landon, 2 Conn. 404; S. C. 3 Id. 76.

[7] Dodge *vs.* Adams, 19 Pick. 429.

[8] Dearborne *vs.* Bowman, 3 Met. 158. As to the guaranty of an existing debt, see *ante*, §14. Clark *vs.* Small, 6 Yerg. 418.

[9] Pillans *vs.* Mierop, 3 Burr. 1671–2.

[10] Bac. Abr. Ass. (D), Lampleigh *vs.* Braithwaite, Hob. 106, 22 Am. Jur. 2–16.

though conferred at his request.[1] The allegation of a request has lately been considered unnecessary, if, from its nature, the benefit could not have been a gratuitous kindness.[2]

§ 46.—The request necessary to prevent a consideration being regarded as a voluntary courtesy may be expressed in words or implied from circumstances. It is implied where one person allows another to confer a benefit upon him with his knowledge and tacit assent, having no good reason to suppose it to be conferred as a gratuity and afterwards availing himself of it.[3] A subsequent promise may, in some cases, be evidence of a previous request.[4] But the beneficial nature of the consideration, although adopted, will not, in many instances, as might be inferred from expressions in the books[5] alone sustain the allegation of a request; as where the course of dealing between the parties and the circumstances of the case will not justify the inference that it was done at the instance of the party benefitted, and it is of such a nature and so attached to his property that he cannot reject it.[6]

§ 47.—There are cases where both the request and the promise

[1] University *vs.* McNair, 2 Iredell Ch. 605. Services rendered on request are presumed not to have been gratuitous; *nemo præsumitur donare.* Morton *vs.* Noble, 1 La Ann. 197.

[2] Fisher *vs.* Pyne, 1 M. & G. 265, note (b); Victors *vs.* Davies, 12 M. & W. 758.

[3] See Livingston *vs.* Rogers, 1 Caines, 585; Hicks *vs.* Burnham, 10 Johns. 243; Oatfield *vs.* Waring, 14 Id. 196; Edwards *vs.* Davis, 16 Id. 281. Weston *vs.* Davis, 24 Maine, 374; Hatch *vs.* Purcell, 1 Foster N. H. 247, Yelv. 41, note; Osborne *vs.* Rogers, 1 Saund. (Williams'), 264, note (1). A father's allowing his child to wear clothes furnished by a tailor, is an instance of implied request. Law *vs.* Wilkin, 6 A. & E. 718.

[4] See the cases cited in the preceding note.

[5] Osborne *vs.* Rogers, 1 Saund. (Williams'), 264, note (1); Livingston *vs.* Rogers, 1 Caines, 585, Chitty Contr. 62.

[6] As where one voluntarily saves another's goods from destruction, except in cases of salvage; Bartholomew *vs.* Jackson, 20 Johns. 28; Nicholson *vs.* Chapman, 2 H. Bl. 254, Story Bailm. 121 (a); or enters another's land without authority and makes improvements. Frear *vs.* Hardenbergh, 5 Johns. 272. A purchaser of the public lands is under no legal obligation to remunerate a *squatter* for improvements made on them by him, even although the purchaser has promised to do so. Carson *vs.* Clark, 1 Scam. 113; Watson *vs.* Overturf, Id. 170; Townsend *vs.* Briggs, Id. 472; Roberts *vs.* Garen, Id. 396; McFarland *vs.* Mathis, 5 English (Ark.), 560.

are implied, as where one person is compelled to do that which another is primarily obligated to do. Thus a surety who has been compelled to pay the principal's debt, may recover the amount of him without his prior request or subsequent promise.[1] In the original agreement, the principal promised to save his surety harmless by an implication of law. But if one person without compulsion of law or legal obligation, pays the debt or discharges the legal obligation of another without his request, the debtor is not liable to him for the amount paid.[2] To render him liable in such a case, might deprive him of the privilege of set-off against the original creditor, harass him with suits, and bring him under legal liability to unreasonable creditors. But such reasons fail when the debtor promises the party to remunerate him for what he has done towards discharging his obligation, and such a promise is binding.[3] It is like the subsequent ratification of the act of a voluntary agent done without authority, which is equivalent to a previous authority; and another reason for enforcing such a promise, may be found in the policy of the law which favors the discharge of the obligations it imposes.

§ 48.—But although an executed consideration on request will support an assumpsit, it will sustain no promise, not even an express one, differing from that which the law would imply; and if the promisor engages to confer any other or additional benefit, not thus implied, he will not be bound unless some new consideration be

[1] 1 Saund. 264; note. 1 Smith L. C., Lampleigh *vs.* Braithwaite.

[2] Osborne *vs.* Rogers, 1 Saunders, (Williams) 264; note.

[3] So it has been held recently in Massachusetts, Gleason *vs.* Dyke, 22 Pick. 390. Dearborne *vs.* Bowman, 3 Met. 158. Story Notes, § 185. There are *dicta* to the same effect in Hatch *vs.* Purcell, 1 Foster, N. H. 544. Doty *vs.* Wilson, 14 Johns. 382. Greeves *vs.* McAllister, 2 Binn. 591. There are English cases decided on the ground of a moral obligation being a sufficient consideration for an express promise which may be sustained on this principle, as where the overseers of a parish legally bound to support a pauper, relieved by another, promised to pay for such relief, they were held. Watson *vs.* Turner, Bull. N. P. 129, 147, 281. Atkins *vs.* Barnwell, 2 East, 515. Paynter *vs.* Williams, 1 Cromp. & Mees. 810. Wing *vs.* Mill, 1 B. & Al. 104. See 1 Saunders, (Williams) 264; note (1). Chitty Cont. 62. Lampleigh *vs.* Braithwaite, 1 Smith L. C. note. Selwyn N. P. (11 ed.) 53; note. Kaye *vs.* Dutton, 7 M. & G. 807; *contra*, 1 Vin. Abr. 279.

found to sustain it.[1] Thus it has been held that an executed consideration whereon the law implies a promise to pay on request, (as upon an account stated,) is not sufficient to sustain a promise to pay at a future day.[2]

§ 49.—An entire promise, founded partly on an executory and partly on an executed consideration, is supported by the former.[3] Thus where a person had furnished board to another's son, for which the son alone was liable, and continued to furnish it at the father's request, who promised his security both for the past and future board, the entire promise was founded on a valid consideration, notwithstanding the son boarded with him only a day longer.[4] Cases are put of promises founded on an existing liability, which is sometimes called a continuing consideration, as a tenant's promise to manage a farm in a husband-like manner.[5] But here the tenant's promise is void, so far as it extends beyond his existing liability.[6]

§ 50.—*Failed Considerations.*—A consideration which was supposed to exist when the contract was made, may turn out not to have existed, or one which was to be performed, may not have been performed at all, or only partially, or otherwise not according to the contract.[7] If the failure is total, the contract founded on such a consideration is a nullity. If it is partial, and the contract is severable, or founded on two distinct considerations, it may be apportioned to the

[1] Granger *vs.* Collins, 6 M. & W. 458. Jackson *vs.* Cobbin, 8; Id 790. A declaration stating that in consideration, the plaintiff had bought a horse of the defendant at his request, the defendant promised he was free from fault, was not sustained; Roscola *vs.* Thomas, 3 Q. B. 234.

[2] Hopkins *vs.* Logan, 5 M. & W. 241. The dictum of a judge, profoundly read in the common law, confines this rule to those cases where a promise is implied by law from the consideration; per Tindall, C. J. Kaye *vs.* Dutton, 7 M. & G. 807. See Smith Cont. 112; notes.

[3] Com. Dig. Ass. B. (12).

[4] Loomis *vs.* Newhall, 15 Pick. 159. See a similar case Bret. *vs.* J. S. et ux Cro. Eliz. 756.

[5] Cotton *vs.* Trescott, 3 Bulst. 187. Powley *vs.* Walker, 5 T. R. 373.

[6] See *ante*, § 48.

[7] Hitchcock *vs.* Giddings, 4 Price, 135; Allen *vs.* Hammond, 11 Peters, 63; 2 Kent. Comm. 468. Pothier puts the case of an heir promising to pay the supposed legacy of his ancestor. 1 Oblig. (Evans) 42.

extent of the actual consideration.[1] The contract may be made severable in its inception and by its nature, or by subsequent agreement, express or implied. It may be implied in general where the contract is to furnish labor and materials, and part performance is accepted.[2] The vendor of a chattel, who has committed fraud in its sale, or has not fulfilled his warranty, cannot recover the full price of the vendee, but the fraud or breach of warranty may be pleaded in abatement of damages, or where no benefit has been received, as a complete defence.[3] If the consideration of a promissory note is entire and totally fails, the failure is a valid defence between the immediate parties;[4] and, according to the weight of American authorities, a partial failure is a defence *pro tanto*.[5] Partial failure of title to land, conveyed by deed with warranty, is no defence to an action on a note or bond for the purchase money, and the grantee must resort in such cases to the covenants for his remedy.[6] But total failure, according to the weight of American authorities is in such cases a good defence, neither the covenants nor the temporary possession with liability to account for mesne profits being a consideration.[7] This total failure to be a defence, must be evidenced by a judicial test as by eviction, or something tantamount thereto.[8]

[1] Parish *vs.* Stone, 14 Pick. 198.

[2] Farnsworth *vs.* Garrard, 1 Camp. 40, *note.* Mondel *vs.* Steel, 8 M. & W. 858; Hayward *vs.* Leonard, 7 Pick. 181; Britton *vs.* Turner, 6 N. H. 481. Sedgwick on Damages, Ch. vii., where the conflicting cases are reviewed.

[3] Street *vs.* Blay, 2 B. & Ad. 456; Poulton *vs.* Lattimore, 9 B. & C. 659; Beecher *vs.* Vrooman, 13 Johns, 302; McAllister *vs.* Reab, 4 Wend. 483, S. C. 8 Id. 109; Shepherd *vs.* Temple, 3 N. H. 455.

[4] Still *vs.* Rood, 15 Johns, 230; Dickinson *vs.* Hall, 14 Pick. 217; Parish *vs.* Stone, 14 Id. 198; Loring *vs.* Sumner, 23 Id. 98.

[5] Spalding *vs.* Vandercook, 2 Wend. 431; Batterman *vs.* Pierce, 3 Hill, 171; Burton *vs.* Stewart, 3 Id. 236; Mason *vs.* Wait, 4 Scam. 127; Duncan *vs.* Charles, Id. 561; Barton *vs.* Rice, 22 Pick. 508; Paley *vs.* Balch, 23 Id. 283; Goodwin *vs.* Morse, 9 Met. 279; *Contra*, Thornton *vs.* Wynn, 12 Wheat. 183; 12 Conn. 234; Scudder *vs.* Andrews, 3 McLean, 464, Burton *vs.* Schermerhorn, 21 Vt. 89.

[6] Greenleaf *vs.* Cook, 2 Wheat. 13: Smith *vs.* Sinclair, 15 Mass. 171.

[7] Frisbie *vs.* Hoffnagle, 11 Johns, 50; Knapp *vs.* Lee, 3 Pick. 452; Rawle on Covenants for Title, §§ 491–506; *Contra*, Lloyd *vs.* Jewell, 1 Greenl. 352; Whitney *vs.* Lewis, 21 Wend. 131.

[8] Wilson *vs.* Jordan, 3 Stew. & Por. 92; Tallmadge *vs.* Wallis, 25 Wend. 107.

§ 57.—*Impossible Considerations.*—An impossible consideration will not sustain a contract, whether the impossibility results from natural or municipal law.[1] If the consideration is only impossible to be performed by the promisor, but may be performed by others, it is sufficient, and he must either procure others to perform it, or give damages for its non-performance.[2] And a consideration, the performance of which is only difficult, contingent or improbable, will support a contract.[3]

§ 52.—*Considerations void in part.*—If one of two considerations of a contract be merely void, and not illegal, it may be rejected as surplusage and the contract supported by the other.[4] A promissory note founded on two distinct considerations, one of which is valid and the other void, may be apportioned, and the payee be allowed to recover to the extent of the valid consideration.[5] If an *entire* agreement has two considerations, one of which has not been put in writing in compliance with the statute of frauds, the whole, it has been held, is void and cannot be apportioned.[6]

§ 53.—*Illegal Considerations.*—A consideration partially or totally illegal will not support a contract.[7] *Ex turpi causa non oritur actio.*[8] It is absolutely void, if hostile to the tone, precepts or purposes of the law. It must not involve the commission of any act which the common law forbids, or the omission of any act which it enjoins.[9] It must not contravene the prohibitions of a statute, whether conveyed in express terms or to be inferred by just impli-

[1] Co. Litt. 206, (b); Harvey *vs.* Gibbons, 2 Lev. 161; Nerot *vs.* Wallace, 3 T. R. 17; Phinney *vs.* Mann, 1 Rhode Is. 206; 1 Selwyn N. P. 50. Powell on Cont. 161, 164, 179; Paley's Moral & Polit. Philos. Bk. iii. Ch. v. § 111.

[2] Tufnell *vs.* Constable, 7 A. & E. 798; Gilpin *vs.* Consequa, Peters, C. C. 86.

[3] Huling *vs.* Craig, Addison, 343: Yonqua *vs.* Nixon, Peters, C. C. 224.

[4] Chitty Cont. 61, and cases cited.

[5] Parish *vs.* Stone, 14 Pick. 198; Loring *vs.* Sumner, 23 Id. 98.

[6] Charter *vs.* Becket, 7 T. R. 201; The Lord Lexington *vs.* Clarke, 2 Vent. 223; Crawford *vs.* Morrell, 8 Johns. 253; Loomis *vs.* Neweall, 15 Pick. 159. This last case has recently been overruled in Massachusetts in an unreported decision.

[7] Collins *vs.* Blantern, 2 Mils. 347; Toler *vs.* Armstrong, 11 Wheat. 258; Deering *vs.* Chapman, 22 Maine, 488.

[8] Inst. Lib. 111, Tit. 20, § 24, 1 Pothier Oblig. (Evans) 43–46.

[9] Boardman *vs.* Gore, 15 Mass. 331; Brumley *vs.* Whiting, 5 Pick. 348; Belding *vs.* Pitkin, 2 Caines, 147; Whitaker *vs.* Cone, 2 Johns. Cas. 58.

cation, as from the infliction of a penalty.[1] It must not conflict with the purposes of the law, and tend to defeat justice or corrupt its administration.[2] It must not interfere with a wise public policy, either imposing improper restraints on trade[3] or marriage,[4] or chilling competition at public auctions.[5] It must not involve transactions hostile to sound morals,[6] and we may add, the Courts administering a system of jurisprudence of which Christianity is said to form a part, may in general, pronounce it a nullity when it violates her precepts. To these general rules there are some important modifications or explanations. A promise to indemnify an illegal act *to be done*, which is apparently legal is sometimes binding.[7] So a bond or parole promise on good consideration, to indemnify an illegal act *already done*, is not included within the rules we have stated.[8] And a contract between parties who have been engaged in an illegal enterprise, which would not have been made but for such enterprise, but is entirely disconnected from it, is not void, because of illegal consideration.[9] A more minute illustration of the classes of illegal considerations belongs to the distinct topic of illegal contracts.[10]

Cincinnati, 1854. E. L. P.

[1] Featherston *vs.* Hutchinson, Cro. Eliz. 199; Hall *vs.* Henderson 7 Humph. 199; Leavitt *vs.* Palmer, 3 Comst. 19. The distinction between *mala in se* and *mala prohibita* in this respect is now disregarded. U. S. *vs.* Owens, 2 Peters, 538; Greenough *vs.* Balch, 7 Greenl. 462.

[2] 4 Bl. Comm. 120; Badger *vs.* Williams, 1 Chip. 137; Meredith *vs.* Ladd, 2 N. H. 517; Swan *vs.* Chandler, 8 B. Munr. 98; Hodson *vs.* Wilkins, 7 Greenl. 113.

[3] Mitchell *vs.* Reynolds, 1 P. W. 181.

[4] 1 Story Eq. Juris. § 274.

[5] Phippen *vs.* Stickney, 3 Met. 384; Gardiner *vs.* Morse, 25 Maine, 140; Small Jones, 1 W. & S. 128; Hamilton *vs.* Hamilton, 2 Rich. Eq. 355; Brisbane *vs.* Adams, 3 Story, 611; Veazie *vs.* Williams, 3 Id. 611; S. C. 8 Howard, 134.

[6] Mitchell *vs.* Smith, 1 Binn. 120; Forsyth *vs.* Ohio, 6 Ohio, 24; Fores *vs.* Richardson, 4 Esp. 97.

[7] Bacon Ab. Ass. E. Allaine *vs.* Orland, 2 Johns. Cas. 56; Coventry *vs.* Barton, 17 Johns. 142; Avery *vs.* Halsey, 14 Pick. 174.

[8] Williams *vs.* Lowndes, 1 Hall, 588, 1 Caines, 450; Doty *vs.* Wilson, 14 Johns. 381, 17 Vt. 244, 11 Mod. 93; 1 Comyn Cont. 30.

[9] Toler *vs.* Armstrong, 4 Wash. C. C. 297; S. C. 11 Wheat. 258; Wooten *vs.* Miller, 7 S. & M. 380; Howell *vs.* Fountain, 3 Geo. 176.

[10] Chitty Cont. 657–727.